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No. _____

In the Supreme Court of the United States

October Term, 1985

JOHN HOLMAN & SONS LTD., and HORACE, HOLMAN & COMPANY LTD.,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO,

Respondent,

DONALD J. CORREIA and CHERYL M. CORREIA, LAWTON-BRYNE-BRUNER INSURANCE AGENCY COMPANY, CANADIAN INTERNATIONAL MARINE UNDERWRITERS LTD. and CANADIAN MARINE UNDERWRITERS LTD.,

Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions requiring plenary consideration by this Court:

1. Whether, consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the State of California may assert personal jurisdiction over a foreign insurance broker, which had no contact with California, solely because the broker procured insurance in the United Kingdom which afforded coverage to a fishing fleet including vessels with foreseeable California contacts?

2. Whether, consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the State of California may also assert personal jurisdiction over a second foreign insurance broker based solely upon its subsequent purchase of a portion of the assets of the first broker?

3. Whether, consistent with the requirements of Due Process and Equal Protection of the law under the Fourteenth Amendment of the United States Constitution, the State of California may afford merely discretionary review of the due process issues involved in its assertion of personal jurisdiction over foreign corporations and then treat such parties' defense on the merits as a waiver of their federal constitutional claims?

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PETITION FOR WRIT OF CERTIORARI

Petitioners John Holman & Sons Ltd., a corporate citizen of the United Kingdom, and Horace, Holman & Company Ltd., a corporate citizen of the United Kingdom,[1] and each of them pray that a Writ of Certiorari will issue to review the order and opinion

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[1]The parties to the proceedings are shown in the caption hereto.

John Holman Holdings Ltd. is the holding company for John Holman & Sons Ltd., which has the following subsidiaries: John Holman Financial Services Ltd., Holman General Facilities Ltd., Holman Motor Facilities Ltd., Holman Special Risks Ltd., British Marine Underwriting Agents Ltd., Martin Lane Ltd., Holman Professional Indemnity Ltd., and John Holman & Sons Inc.

H. Clarkson PLC is the holding company for Horace, Holman & Company Ltd., which has the following subsidiaries: Horace, Holman Marine & Overseas Ltd., Horace, Holman U.K. Ltd., Holman Wade Ltd., and Horace, Holman Reinsurance Services Ltd.

of the Superior Court of the State of California, County of San Diego, denying Petitioners' motions to quash service of summons for lack of personal jurisdiction.

OPINIONS BELOW

The orders and written decision of the Superior Court denying Petitioners' motion to quash service of summons are reproduced in the Appendix hereto at pages A1 to A12.

By order of August 16, 1985, the California Court of Appeal for the Fourth Appellate District, Division One summarily denied petition for writ of mandate without opinion. (App. A12.) The California Supreme Court denied review without opinion by order of September 25, 1985. (App. A13.)

JURSIDICTION

The judgment submitted for review is an order denying Petitioners' motions to quash service of summons for lack of personal jurisdiction under the Due Process Clause of the Fourteenth Amendment.

Under California law the Superior Court's denial of Petitioners' motions to quash is subject only to discretionary review by petition for writ of mandate. California Code of Civil Procedure section 418.10. California law thus puts Petitioners to the choice of defaulting or of defending on the merits but thereby losing the right to contest jurisdiction on appeal. *McCorkle v. City of Los Angeles,* 70 Cal.2d 252, 257-258 (1969); *Danzig v. Jack Grynberg & Associates,* 161 Cal.App.3d 1128, 1140-1141 (1984). The validity of this procedure under the Due Process and Equal Protection Clauses of the Fourteenth Amendment was raised in the petition for review filed with the California Supreme Court.

This Court's jurisdiction lies under 28 U.S.C. section 1257, subdivision (3). See *Calder v. Jones*, ___ U.S. ___, 104 S.Ct. 1482, 1486, n. 8 (1984); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1969); see also *General Council on Finance and Administration v. Superior Court*, 439 U.S. 1355, 1371-1372 (1978) (Rehnquist, J., in chambers).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourteenth Amendment of the United States Constitution states in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Code of Civil Procedure section 410.10 provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

STATEMENT OF THE CASE[2]

Synopsis: An English insurance broker, which does not do business in California, acting at the request of a Canadian corporation, succeeded in placing certain layers of insurance overseas, to cover a Missouri corporation's tuna fishing fleet. A personal injury action was brought by a seaman on one of these vessels having a California owner and home port; this action ultimately led to a dispute over insurance coverage in which jurisdiction was asserted under California's long-arm statute over the insurance broker and a second brokerage company which had subsequently purchased some of the first broker's assets. The two brokerage companies

[2]Because of the manner in which the case arises, the relevant facts are established without substantial controversy by the pleadings and declarations filed in connection with motions to quash.

moved to quash service on federal due process grounds. Their motions were denied and the California appellate courts summarily denied review.

1. The Insurance Policy.

Ralston Purina Company, a Missouri corporation, regularly seeks liability insurance coverage for a fleet of marine vessels, namely tuna boats. Lawton-Bryne-Bruner Insurance Agency Company ("LBB"), also a Missouri corporation, was responsible for obtaining this coverage for the policy to become effective December 1, 1980. It succeeded in placing only 30% of the first $500,000 layer of risk. LBB then requested Canadian International Marine Underwriters Limited ("CIMU"), a Canadian corporation headquartered in Toronto, to see if it could place the remaining 70% of the $500,000 primary insurance and also layers of excess insurance to $5,000,000. CIMU succeeded in placing 70% of the first $100,000 with an Italian insurer and 70% of the next primary layer ($200,000 excess of $100,000) with another carrier. CIMU then reportedly told LBB it would be necessary to go to the London market to attempt to place further coverage.

CIMU then engaged John Holman & Sons, Ltd. (hereinafter sometimes "John Holman" or "John Holman & Sons"), a London brokerage firm, which succeeded in placing 70% of the third layer of primary coverage ($200,000 excess of $300,000) with Bedford Insurance Company Limited, a Hong Kong corporation, the first layer of excess ($500,000 excess of $500,000) with Reinsurances Limited, a Cayman Islands corporation,[3] and additional excess coverage with Lloyds and London companies.

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[3]John Holman's exclusive contact with California at any stage of the transaction involved communicating with Duncanson & Holt, the reinsurer of Reinsurances Limited. John Holman wanted to

The insurance policy was issued to Ralston Purina and covered 36 specified tuna boats. The policy issued by the London market insurers contained a "New York suable clause" stating in pertinent part:

> "The place of physical and actual issue and delivery of this policy is the City of London, but nevertheless, as between the assured and the assurers the place of suit hereon shall be deemed the State of New York, United States of America, and any suit hereon may be brought against the Underwriters in any Court of competent jurisdiction within the United States."

2. The Accident And Settlement.

In March, 1981, Donald J. Correia, a seaman, was injured aboard the vessel *Conquest,* one of the ships covered under the Ralston Purina policy, although it was owned by a California corporation. Mr. Correia and his wife filed suit in California; a settlement was ultimately reached requiring payment by the defendant's insurers of $500,000, in two installments. The second payment of $200,000 due June 1, 1984, was not made (in substantial part because of the insolvency of the Bedford Insurance Company, the carrier of 70% risk on the third layer of primary coverage), thus leading to the filing of the instant lawsuit.

In this action Mr. Correia and his wife sued the *Conquest's* insurance carriers and also LBB, alleging bad faith breach of the settlement agreement and other causes of action. LBB then filed a 43-page cross-complaint against some 20 defendants scattered around the world,

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verify the standing of Reinsurances Limited. Duncanson & Holt, a New York corporation, responded to these inquiries from its San Francisco office.

basically every insurer, reinsurer, intermediary or broker that had had any connection with the subject policy. LBB, which asserted it had paid the Correias the amount of the "missing settlement monies," alleged numerous causes of action.

John Holman & Sons was swept in as a cross-defendant because of its placement of a portion of the coverage in the London market, the primary charge being negligent placement of insurance. Horace, Holman & Company Ltd. (hereinafter generally "Horace, Holman" or "Horace, Holman & Company"), was named as the alleged successor of John Holman & Sons.

3. The Motions To Quash.

John Holman & Sons and Horace, Holman & Company moved to quash service on the cross-complaint asserting lack of the minimum contacts required by the Due Process Clause of the Fourteenth Amendment for California to assert personal jurisdiction over them. Supporting declarations established without contradiction that John Holman & Sons was not present in California, did not do business here, had had no dealings with the California corporation owning the *Conquest*, did not know that any of the insured vessels were owned by a California corporation or had a California home port or even sailed in California waters, and did not intend to cause any effect in California. (App. A18 - A32.)

It was further shown that John Holman & Sons was still in operation; that Horace, Holman & Company was not present in California, had had no connection with the subject policy (Horace, Holman was not then in existence) and was not the successor of John Holman & Sons; that Horace, Holman had merely purchased certain good will from John Holman. (App. A15-A17.)

The Superior Court originally granted the motion to quash service on the cross-complaint as to both John Holman & Sons and Horace, Holman & Company. However, the court eventually reconsidered this ruling at the same time it heard John Holman's motion to quash service on plaintiffs' amended complaint, which substantially duplicated the cross-complaint (service having been made on John Holman, but not Horace, Holman). This time the motions to quash were denied.

The Superior Court's decision treats John Holman & Sons and Horace, Holman & Company collectively; the only fact cited with respect to "Holman" is that it had placed and acknowledged placement of insurance coverage which contained the New York suable clause: "Accordingly, Holman is part of the chain of insurance, subject to U.S. jurisdiction."

The court went on to state: "Holman need not have intended to cause an effect in California by its placement of a layer of insurance on a California vessel. However, such act could reasonably have been expected by Holman to have an effect in California. Further, insurance and its effects on California residents are subject to regulation by California." The court concluded that limited personal jurisdiction could properly be exercised over "Holman."

4. The Petitions For Relief.

On August 15, 1985, John Holman & Sons and Horace, Holman & Company jointly filed a timely petition for writ of mandate to compel the Superior Court to grant their motions to quash service[4] and for other relief. The next day the petition was summarily

[4]The Superior Court's original decision had not clearly decided all issues before it on the motions. Therefore John Holman & Sons

denied with the statement: "The petition is denied because no abuse of discretion was shown." (App. A13.) A timely petition for review was filed in the California Supreme Court. This, too, was summarily denied. (App. A14.)[5]

REASONS FOR GRANTING REVIEW

I.

CALIFORNIA'S ASSERTION OF PERSONAL JURISDICTION OVER PETITIONERS REPRESENTS A QUANTUM LEAP BEYOND THE BOUNDARIES ESTABLISHED BY THIS COURT'S DECISIONS, VIOLATES ACCEPTED STANDARDS OF DUE PROCESS AND THREATENS SETTLED PRINCIPLES OF INTERNATIONAL COMITY.

California's assertion of personal jurisdiction over a London insurance broker solicited by a Canadian corporation to perform services in the United Kingdom gives a new meaning to the term "long-arm jurisdiction". That California also asserts personal jurisdiction over a second English corporation based upon its relations with the first dramatically reveals the extent to which California has shed the constitutional constraints previously articulated by this Court.

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and Horace, Holman & Company had renewed their motions to quash or in the alternative to dismiss for inconvenient forum or for clarification of the order, in conjunction with which they were granted an extension of time within which to petition for writ of mandate under Code of Civil Procedure section 418.10. The Superior Court denied the renewed motion without further hearing. (App. A1-A2.)

[5]The petition for review rasied both the jurisdictional issues and the due process/equal protection challenge to the California rule providing for only discretionary review of these issues coupled with a rule finding waiver of the jurisdictional issues if a party subsequently defends on the merits.

"The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants." *Kulko v. Superior Court,* 436 U.S. 84, 91 (1978). It is, however, no limitation at all if it permits the assertion of personal jurisdiction in this case. Until now, it has seemed clear, even if perhaps not expressly stated by this Court, that a state may not simply reach around the world to assert jurisdiction based upon some metaphysical notion that the acts of a person somewhere in the world had a local effect in California. Thus, until now it was settled that California could not properly assert jurisdiction over a party like John Holman even if Holman had been directly solicited regarding placement of insurance by a California resident. To the contrary "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. . . . [I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958); *Helicopteros Nationales De Columbia, S.A. v. Hall,* ___ U.S. ___, 104 S.Ct. 1868, 1873 (1984). John Holman did no such thing; and Horace, Holman did not even exist at the time the Ralston Purina policy was placed.

California appears to have adopted a "foreseeable effect" or expanded "stream of commerce" test for personal jurisdiction which is fundamentally at odds with any semblance either of " 'fair play and substantial justice' ", *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945), or the prudential restraint necessary in international relations. In *World-Wide Volkswagen*

Corp. v. Woodson, 444 U.S. 286, 295 (1980) the Court explained that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause," yet the decision in this case rests on just such as basis. A London brokerage house may place insurance which insures things anywhere in the world; the Ralston Purina fleet alone might travel anywhere. But if a seller of a product cannot be haled before a court anywhere his product happens to wind up, *id.* at 296, how can a person who sells no product but only performs a service be haled anywhere in the world depending merely on the location of a product with which his services have some connection?

Foreseeability alone is too shapeless a premise for application of constitutional principles of due process; a vessel is, like the automobile considered in *World-Wide Volkswagen*, inherently mobile; it (and its insurance coverage) may cause an "effect" wherever it goes. The relevant foreseeability, however, is that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297. A person who does not do business in California, who performs services only in London and is sought out and engaged to do so by a Canadian corporation cannot reasonably be expected to anticipate that he will have to answer for his conduct in a California court.

Even if one assumes that the various states in this country may assert jurisdiction over citizens of other states simply on the basis of an effect caused in the forum, the assertion of personal jurisdiction over a corporate citizen of the United Kingdom which performed services entirely in its homeland surpasses all bounds of reason and fairness. The federal courts have quite consistently held that " 'the foreign-act-with-

forum-effects jurisdictional principal "must be applied with caution, particularly in an international context" ' ", *Pacific Trading Co. v. M/V Main Express,* 758 F.2d 1325, 1330 (9th Cir. 1985); *Kramer Motors, Inc. v. British Leyland, Ltd.,* 628 F.2d 1175, 1178, *cert. denied,* 449 U.S. 1062 (9th Cir. 1980); *Leasco Data Processing Equipment Corp. v. Maxwell,* 468 F.2d 1326, 1341 (2nd Cir. 1972).)

As one court has stated, "the analysis of reasonableness may take into account the nature of the sovereignity of a defendant's state. We do not minimize the sovereignty of the states within our federal system when we conclude that foreign nations present a higher sovereignty barrier than that between two states within our union." *Insurance Co. of North America v. Marina Salina Cruz,* 649 F.2d 1266, 1272 (9th Cir. 1981). The reasons for a more restrained exercise of jurisdiction as respects foreign citizens, particularly when they are sought out in their homeland, are obvious. This Court's observation in a related context is apt:

> "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *M/S Bremen v. Zapata Off-Shore Company,* 407 U.S. 1, 9 (1972).

A recent commentary explains:

> "It is also important that other nations consider United States jurisdictional policy to be fair. If other nations believe that American policy unfairly disadvantages their citizens or that it proceeds from fiat rather than principle, they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own. Predictability imbues a finding of

> jurisdiction with a minimum degree of fairness. If an individual can foresee that a course of conduct may subject him to a state's jurisdiction, yet chooses to pursue that course nonetheless, his 'being haled into court' at a later date will not appear unjust." Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction* (1985) 98 Harv. L. Rev. 1310, 1320-1321 (fns. omitted); see also *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 239.

Due process should forbid California from asserting jurisdiction in this case even if the California corporation which owned the *Conquest* had itself called John Holman & Sons in London and asked that it place insurance in the London market. The lack of any such direct connection, however, illustrates the limitless and unfair nature of the trial court's analysis. A "chain of insurance" or of other commercial transactions may stretch around the world, as witness this case. The "effect" of the transaction in California is the same regardless how far the chain stretches, how isolated the transaction, how remote the connection with the transaction and how little the knowledge of any potential for a California effect. John Holman & Sons, for example, was engaged by a Canadian corporation to place insurance in London; it in turn dealt with a Hong Kong company, a Cayman Islands corporation and various London underwriters.

Consider, also, Horace, Holman & Company, which did not receive the individual assessment of its contacts enjoined by this Court. See *Calder v. Jones, supra,* 104 S.Ct. at 1487; *Rush v. Savchuk,* 444 U.S. 320, 332 (1980); it had no connection with California *or* the Ralston Purina policy, but merely purchased certain good will

from John Holman & Sons. Did this purchase, too, foreseeably cause some indefinable effect in California? To say so makes both foreseeability and effect so attenuated as to permit any court anywhere to assert jurisdiction over anyone.

The exercise of jurisdiction over a foreign national who provided services in its own country at the request of a corporate citizen of another country is unwarranted, inequitable and capricious, whether or not this activity caused a foreseeable but unintended California effect of some ephemeral kind. We are aware of only one case which bears a strong factual similarity to this one (at least as respects John Holman & Sons) and it flatly rejects the assertion of jurisdiction.

In *Birmingham Fire Ins. Co. v. KOA Fire & Marine Ins. Co.*, 572 F.Supp. 962 (S.D.N.Y. 1983), two insurance companies sued KOA Fire & Marine Insurance Co., Ltd. ("KOA") for allegedly refusing to indemnify pursuant to certain reinsurance agreements to which KOA had been committed by American Agency Underwriters, Inc. ("AAU"). KOA commenced a third party action against AAU, Pierre LeBlanc (International) and Co., Ltd. ("LeBlanc") (an insurance brokerage) and 59 other reinsurance companies and reinsurance intermediaries. Much as in this case, LeBlanc, a French corporation, and others were alleged to have breached their fiduciary duties to KOA. LeBlanc moved to quash service.

KOA argued, *inter alia*, in terms almost identical to those used by the trial court, that "LeBlanc knew that it was a link in a chain of participants in a scheme to effectuate the reinsurance of New York risks" and had therefore supplied services or otherwise had engaged in some purposeful activity in New York. The court rejected these arguments stating (at 967):

> "It is of course true that a reinsurance broker who arranges for foreign retrocessionaires to participate in a pool involving New York risks provides some incidental benefits to insured parties in New York. In an extremely attenuated sense, LeBlanc, in its role as broker, ends up supplying some services to these insured parties, but this purported supplying of services, which is three, four, or five steps of transactions removed from the initial insured parties in New York, is far too attenuated a contact to justify [the] exercise of *in personam* jurisdiction.' [Citing *World-Wide Volkswagen, supra,* 444 U.S. at 299.] LeBlanc's role is more properly seen as supplying services in Pennsylvania to AAU and in foreign countries to the foreign reinsurers that it has contacted and persuaded to participate in the AAU pool." See also *Birmingham Fire Ins. Co. v. KOA Fire & Marine Ins. Co.,* 572 F.Supp. 969 (S.D.N.Y. 1983) [motion to quash made by another party in the action].

The case as to John Holman & Sons (and *a fortiori* as to Horace, Holman & Company) is even stronger. Its dealings were entirely with foreign companies within the United Kingdom; unlike LeBlanc it did nothing anywhere in the United States. It performed services in the United Kingdom at the request of a Canadian corporation. It had no reason to expect that if the propriety of its conduct were ever called in question it might have to defend itself in a California court, whether in a cross-action by a Missouri corporation with whom it had had no dealings nor, even more remotely, a party injured on a boat insured under a policy issued to a Missouri corporation.

It is particularly important now that more and more commercial transactions assume international dimensions that the foreign citizens who may be solicited to become a link in a chain which may ultimately stretch back to California or any other state be given fair warning if this alone is sufficient for them to be haled around the world into any of the courts in this country. It is neither fair nor appropriate that such a major jurisdictional innovation, with its potential consequences for California and the United States, be made ad hoc. To the contrary, if California's long-arm jurisdiction is to be, like the universe, finite but unbounded, principles of due process of law must be radically revised.

II.

THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE FOURTEENTH AMENDMENT REQURE CALIFORNIA TO AFFORD PLENARY NON-DISCRETIONARY REVIEW OF A MOTION TO QUASH MADE ON FEDERAL CONSITUTIONAL GROUNDS.

The California Court of Appeal summarily denied the petition for writ of mandate on behalf of John Holman and Horace, Holman, tersely observing that no abuse of discretion had been shown. However, the primary basis of the petition was that the Due Process Clause forbids the exercise of personal jurisdiction over either John Holman & Sons or Horace, Holman & Company. This is obviously not a matter of discretion.

Under California law, Petitioners can now defend themselves on the merits only at the cost of their right to contest California's exercise of personal jurisdiction. *McCorkle v. City of Los Angeles*, 70 Cal.2d 252, 257-258 (1969); *Danzig v. Jack Grynberg & Associates*, 161 Cal.App.3d 1128, 1140-1141 (1984). The State of

California has thus radically limited the rights of foreigners in its courts, denying to them the right to defend themselves on the merits and still obtain appellate review of this federal constitutional issue as a matter of right. This constitutes a denial of due process of the law and invidious discrimination against non-Californians. Either the California waiver rule is invalid or non-discretionary interlocutory review of the denial of Petitioners' motion to quash is constitutionally required.

Unlike California, the federal courts and the majority of all state courts permit a party to contest personal jurisdiction on an appeal from a judgment on the merits if the issue has been properly preserved. See generally Annot., *Litigant's participation on merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection,* 62 A.L.R.2d 937. In *Michigan Central Railroad Co. v. Mix,* 278 U.S. 492 (1929) this Court ruled that a foreign corporation could not be held to forfeit its constitutional right to object to jurisdiction under an arbitrary rule of local practice. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler,* 263 U.S. 22, 24 (1923); see *James v. Kentucky,* ___ U.S. ___, 104 S.Ct. 1830, 1836 (1984); *Henry v. Mississippi,* 329 U.S. 443, 447-448 (1965); *N.A.A.C.P. v. Alabama,* 377 U.S. 288, 293-301 (1964); *Wright v. Georgia,* 373 U.S. 284, 289-291 (1963).

If a party properly moves to quash service on due process grounds and thereafter seeks but is denied review by petition for writ of mandate, there is no legitimate reason why this fully preserved jurisdictional contention

should not be reviewable on an appeal from the judgment.[6] But assuming California has the right to establish a different method for review of the issue of personal jurisdiction than for other issues, that method cannot treat the assertion of federal constitutional rights less favorably than the assertion of state created rights. By making a petition for writ of mandate the only means of obtaining review (without defaulting) this is precisely what California has done *if* the review by petition for writ of mandate is permitted to be discretionary rather than mandatory.

Due process may not require that the state establish appellate courts, but once it has done so, the right of review cannot "be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet,* 405 U.S. 56, 77 (1972); *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966); *Griffin v. Illinois,* 351 U.S. 12 (1956). By construing the right of review of a motion to quash to be a matter within its discretion, California gives the invocation of traditional notions of fair play and substantial justice, i.e., basic due process, shorter shrift than the most trivial claim of error under state law, which is subject to plenary review on appeal as a matter of right, in many instances without even the need for an objection. See Cal. Code of Civil Procedure sections 647, 904.1. If a distinction is to be drawn between different rights for purposes of review by a higher court, that distinction should logically favor federal constitutional rights over state statutory rights. We submit that principles of due process and equal protection forbid the opposite result.

---

[6]A state obviously cannot properly condition one constitutional right, the right to defend oneself in court, see *Boddie v. Connecticut,* 401 U.S. 371 (1971), on waiver of another right, namely the right to due process of law. See, e.g., *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967).

The absence of any right of review of a motion to quash results in systematic discrimination against foreign defendants. It places basic issues of fairness within the unreviewed "discretion" of the myriad trial judges of the State of California. It puts issues of considerable theoretical complexity, often with the potential for dramatic international implications (as in this case), on the shoulders of busy trial court judges whose decisions are typically final simply because an appellate court chooses not to consider the matter.

This is not the type of procedural due process necessary to protect a foreign defendant's right not to be haled before the courts of one of the United States. It is certainly not equal protection of the laws, as it systematically discriminates against foreign defendants and the assertion of a due process objection to jurisdiction.

Consider, for example, Horace, Holman's position. It is a London brokerage having nothing to do with the entire controversy, according to the undisputed evidence. It cannot understand what it is doing in this lawsuit or why it is in a California court. Yet California now requires that Horace, Holman choose between defending on the merits and denying jurisdiction. Horace, Holman is required to make this choice despite the total lack of any constitutional basis for jurisdiction over it simply because the trial court lumped it together for purposes of decision with John Holman & Sons and then the California appellate courts denied review of this constitutional issue as a matter of their discretion. It is difficult to explain to this corporate citizen of the United Kingdom why the most inconsequential statutory issue raised by a California resident is reviewable on appeal as a matter of right while Horace, Holman &

Company goes begging for appellate relief to which it is indisputably entitled on the merits.

This systematic procedural discrimination obviously compounds the inequity of the extraordinary jurisdictional principles on which the lower court's ruling rests. It necessarily contributes to the sense of unpredictability and unfairness caused by the court's ruling. Jurisdictional principles should not be made and applied in an unreviewed ad hoc manner, especially as regards foreign nationals.

We respectfully urge this Court to grant review to determine whether principles of due process and equal protection of the law require that California afford plenary non-discretionary review of a motion to quash based upon federal constitutional grounds.

CONCLUSION

For all of the foregoing reasons, we respectfully pray that this Court will review the important issues presented by this case.

Respectfully submitted,

MORGAN, WENZEL & MCNICHOLAS
W. MARSHALL MORGAN
WALTER M. YOKA
GRETCHEN M. NELSON

GREINES, MARTIN, STEIN & RICHLAND
ALAN G. MARTIN

By _____
ALAN G. MARTIN

Attorneys for Petitioners
JOHN HOLMAN & SONS LTD.
AND HORACE, HOLMAN & COMPANY LTD.

APPENDIX

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

DATE July 26, 1985 MINUTES DEPT. 35
PRESENT: HON. MACK P. LOVETT JUDGE
CLERK NELLIE PERNICANO REPORTER NOT PRESENT
BAILIFF NOT PRESENT

RECEIVED
JUL 30 1985

526828 DONALD J. CORREIA, et al,

Plaintiffs

vs.

CANADIAN INTERNATIONAL MARINE UNDERWRITERS LIMITED, et al,

Defendants.

ON THE DIRECTION OF THE COURT:

MINUTE ORDER

The above entitled matter came before this Court on April 19, 1985, at 9:00 A.M. for cross defendant's motion to quash service of summons. The matter having been argued and submitted the Court made a decision in said matter dated July 10, 1985. On July 24, 1985, from an ex parte hearing cross defendant scheduled a renewed motion to quash service of summons scheduled for August 8, 1985, at 9:00 A.M. in Dept. 35.

The Court makes the following rulings in this matter:

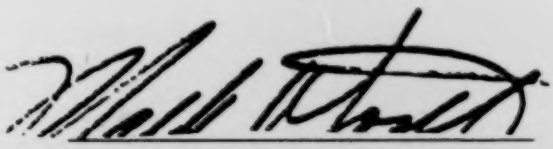
1. Cross defendants' Horace Holman & Company and John Holman & Sons Limited (Holman) motion to quash service of summons is denied.

2. Cross defendants' Horace Holman & Company and John Holman & Sons Limited (Holman) renewed motion to quash service of summons for lack of jurisdiction or in the alternative to dismiss for inconvenient forum; or alternatively for clarification of this Court's order is denied. (Motion filed July 24, 1985)

3. The Court having ruled on cross defendants renewed motion to quash service of summons takes this matter off calendar for the proposed hearing date of August 8, 1985, at 9:00 A.M. in Dept. 35.

4. Attached to this minute order is order of the Court executed and filed July 26, 1985, in this matter. The Court directs the clerk to mail to all parties partaking in this motion a copy of this minute order.

Dated: July 26, 1985



MACK P. LOVETT, JUDGE

PAGE ONE OF ONE

Subscribed and sworn to
before me this 31st
day of January,
1985.

NOTARY PUBLIC

This Affidavit was telexed to the Offices of Morgan, Wenzel & McNicholas on January 31, 1985. A fully-executed Affidavit in the exact form as this will be filed with this court before the hearing on this motion.

GRETCHEN M. NELSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

JUL 26 1985

BY M. PERNICANO, DEPUTY

Case No. 526828

DONALD J. CORREIA, et al.,
Plaintiffs,
v.
CANADIAN INTERNATIONAL MARINE UNDERWRITERS LIMITED, et al.,
Defendants.
AND RELATED CROSS-ACTIONS.

ORDER RE: MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF JURISDICTION OR IN THE ALTERNATIVE TO DISMISS FOR INCONVENIENT FORUM BROUGHT BY DEFENDANTS AND CROSS-DEFENDANTS HORACE HOLMAN & COMPANY, LIMITED, AND JOHN HOLMAN & SONS, LIMITED

This cause came on regularly for hearing in Department 35 of the above-entitled court, the Honorable Mack P. Lovett, Judge Presiding, on April 19, 1985, pursuant to the following:

a) A motion was brought by defendant John Holman & Sons, Limited, to quash service of the summons on the plaintiff's complaint for lack of jurisdiction or in the alternative to dismiss for inconvenient forum;

b) A motion was brought by defendant and cross-complainant Lawton-Bryne-Bruner for reconsideration of the court's ruling of March 7, 1985, in which the court granted a motion brought by Horace Holman & Company, Limited, and John

Holman & Sons, Limited, to quash service of the summons on the cross-complaint filed by Lawton-Bryne-Bruner.

At these motions, Horace Holman & Company, Limited, and John Holman & Sons, Limited, were represented by Gretchen Nelson of the law firm of Morgan, Wenzel & McNicholas. Lawton-Bryne-Bruner was represented by James Gorman of the law firm of Ault, Midlam & Deuprey. The plaintiffs were represented by John Reed of the law firm of Reed & Reed. Defendants and cross-defendants Canadian International Marine Underwriters, Limited, and Canadian Marine Underwriters, Limited, were represented by Donald Gilbert of the law firm of Knapp, Peterson & Clarke. The court, having considered the pleadings, the documents presented and filed with respect to these motions, and the court having heard and considered the contentions of all counsel, and the court having been fully advised in the premises,

IT IS HEREBY ORDERED that the motions brought by John Holman & Sons, Limited, to quash service of the summons on the plaintiffs' complaint and by Horace Holman & Company, Limited and John Holman & Sons, Limited, to quash service of the summons on the cross-complaint filed by Lawton-Bryne-Bruner are denied. The reasoning of the court is set forth in the minute order attached hereto as Exhibit "A" and incorporated herein as though set forth at length.

7/26/85

Dated: _____

JUDGE OF THE SUPERIOR COURT
MACK P. LOVETT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

DATE July 11, 1985 MINUTES DEPT. 35
PRESENT: HON. MACK P. LOVETT JUDGE
CLERK NELLIE A. PERNICANO
REPORTER NOT PRESENT
BAILIFF NOT PRESENT

526828 DONALD J. CORREIA, et al,

Plaintiffs

vs.

CANADIAN INTERNATIONAL MARINE UNDERWRITERS LIMITED, et al,

Defendants.

By: John Reed

By: Gretchen Nelson,
James Gorman,
Donald Gilbert

ON THE DIRECTION OF THE COURT:

MINUTE ORDER RE: RULING ON CIVIL LAW AND MOTION SUBMITTED MATTER

The above entitled matter came before this Court on April 19, 1985, at 9:00 A.M. for cross defendant's motion to quash service of summons with the above named counsel present. The matter having been argued and submitted, the Court makes a ruling that is attached hereto entitled DECISION dated July 10, 1985.

-nap-

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

FILED
JUL 11 1985
BY N. PERNICANO, DEPUTY

DONALD J. CORREIA and CHERYL MARIE CORREIA, Plaintiffs, vs. CANADIAN INTERNATIONAL MARINE UNDERWRITERS LIMITED, SOCIETA ITALIANO ASSICURAZIONI TRANSPORTI (SIAT), AMERICAN CONTINENTAL, LONDON UNDER-WRITERS, CONTINENTAL INSURANCE COMPANY, LLOYDS AND LONDON COMPANIES and H. ROBERT LARKIN and DOES 1 through 25, inclusive, Defendants. AND RELATED CROSS-ACTION.	No. 526828 DECISION

1. On March 7, 1985, before the Honorable Mack P. Lovett in Department 35, a hearing was conducted regarding cross-defendants Horace Holman & Company and John Holman & Sons Limited (Holman) motion to quash service of summons for lack of jurisdiction. Holman was represented by counsel Gretchen Nelson and Walter Yoka. Opposition was filed by attorneys James Gorman and Ault, Midlam & Deuprey. James

Gorman appeared in Court in opposition on behalf of cross-complainants Lawton, Bryne & Bruner Insurance Agency (LBB). Attorney Ron Hapkins appeared for defendant Canadian International Marine Underwriters (Canadian). At the conclusion of the hearing, the Court granted cross-defendants' (Holman's) motion to quash service of summons and denied LBB's motion to continue the hearing.

2. On Friday, April 19, 1985, another hearing was conducted in Department 35 before Honorable Mack P. Lovett on LBB's motion for reconsideration of the Court's ruling on Thursday, March 7, 1985. Attorney John Reed appeared for the plaintiff, Donald J. Correia; Gretchen Nelson appeared for Holman; and Donald Gilbert appeared for Canadian; and James Gorman appeared for LBB.

3. The Court granted the motion for reconsideration, the matter was argued and the Court took the matter under submission.

II. **DECISION:**

1. The Court has determined that cross-defendant's motion to quash service of summons should be denied for the reasons that follow.

Counsel for the defendant and cross-complainant LBB is to prepare a formal order in accordance with this ruling.

III. **ANALYSIS:**

1. In order for limited jurisdiction over Holman to lie, it must be demonstrated that the cause of action arises out of an act done or transaction consummated in California or that Holman purposely availed itself of the privilege of conducting activities in California.

2. The Court makes the following findings:

a. The plaintiffs are residents and citizens of the State of California;

b. The vessel where the injury occurred had its home port in San Diego, California;

c. The vessel was owned by a California corporation whose primary principal is a California resident;

d. Insurance on the vessel was arranged by a California corporation and LBB's bills for premiums were sent to California and paid from California;

e. The insurance policy delivered by LLB to the managing corporation and its principals are all located in California;

f. The insurance policy provided for suit against any underwriter in any competent court in the United States (New York suable clause) and the Holman cover note acknowledged that it has effected insurance subject to the same terms, clauses and conditions as the underlying policy and/or policies. Accordingly, Holman is part of the chain of insurance, subject to U.S. jurisdiction.

3. The case of *McGee v. International Life Insurance* (1957) 355 U.S. 220 is persuasive in this matter. The Court in *McGee* held that it was sufficient to satisfy due process if the contract had substantial connection with California. In *McGee,* the Texas insurance company, as Holman in the instant case, was not the original insurer. An Arizona company, analogous to LBB, which is also a non-California corporation, was the original insurer. In *McGee,* the Texas company assumed its obligations, sent a reassurance certificte to the California residents, which the resident accepted and paid premiums thereon. The insurance contract in the instant case has substantial contacts with California, was

delivered in California, and the premiums were paid there also. These factors appear critical in the *McGee* decision and are supportive of LBB's position.

4. In the case of *Quattrone v. Superior Court* (1975) 44 Cal.App.3d 256, the California court held that it is reasonable to exercise jurisdiction on the basis of a defendant intentionally causing effects in the State by an omission or an act done elsewhere whenever the effects are of a nature that the State treats as exceptional and subject to special regulation.

5. Witkin notes that the rule based on *McGee* has been outlined in the second restatement of Conflict of Law, Section 37, which provides in part that the act, although not done with the intention of causing effects in the State, could reasonably have been expected to do so.

6. Accordingly, Holman need not have intended to cause an effect in California by its placement of a layer of insurance on a California vessel. However, such act could reasonably have been expected by Holman to have an effect in California. Further, insurance and its effects on California residents are subject to regulation by California.

V. **CONCLUSION:**

This Court has determined that it is both reasonable and fair for the State of California to exercise limited jurisdiction over Holman in this particular action.

DATED: _____

MACK P. LOVETT

JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

Case No. 526828

CLERK'S CERTIFICATE OF SERVICE
BY MAIL (CCP 1013a[3])

Robert D. Simmons, Clerk
JUL 11 1985
BY M. PERNICANO, DEPUTY

I HEREBY CERTIFY:

I am not a party to the cause referred to herein.

On the date as shown below, at [San Diego], [XXX], California, I placed a true copy of MINUTE ORDER dated July 11, 1985 and DECISION dated July 10, 1985

in a separate envelope addressed to each addressee as listed below and each envelope was then sealed and deposited in the mail with the postage fully prepaid:

James Gorman, Esq.
Ault, Midlam & Deuprey
5030 Camino de la Siesta, Suite 201
San Diego, California 92108

Andre E. Jardini, Esq.
Knapp, Peterson & Clarke
70 Universal City Plaza, Suite 400
Universal City, California 91608

John S. Rhoades, Esq.
Rhoades, Hollywood & Neil
1010 Second Avenue, Suite 1712
San Diego, California 92101

Gretchen M. Nelson, Esq.
Morgan, Wenzel & McNicholas

1545 Wilshire Blvd. Suite 800
Los Angeles, California 90017

Janet L. Grove, Esq.
O'Connor, Cohn, Dillon & Barr
70 Gold Street at Montgomery
P. O. Box 26690
San Francisco, California 94126

Bonnie Bass, Esq.
Hagenbaugh & Murphy
3701 Wilshire Blvd. 4th Floor
Los Angeles, California 90010

Daniel B. McLeod, Esq.
Alford & MacLeod
701 "B" Street, Suite 1625
San Diego, California 92101

John W. Reed, Esq.
Reed & Reed
7610 Girard Avenue, Suite 200
La Jolla, California 92037

Dated July 11, 1985

ROBERT D. ZUMWALT, Clerk

By Nellie A. Pernicano

Deputy
Nellie A. Pernicano

COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

DIVISION ONE

FILED
Keenan G. Casady, Clerk
AUG 16 1985
COURT OF APPEAL FOURTH DISTRICT

JOHN HOLMAN & SONS, LTD., et al.,

Petitioners,

v.

SUPERIOR COURT, etc., COUNTY OF SAN DIEGO,

Respondent;

DONALD J. CORREIA, et. al.,

Real Parties in Interest.

No. D003476

SUPERIOR COURT NO. 526828

THE COURT:

The petition for writ of mandate has been read and considered by Justices Staniforth, Butler and Brainard.* The petition is denied because no abuse of discretion was shown.

Acting *Presiding Justice*

Copies to: All Parties

*Assigned by the Chairperson of the Judicial Council.

25675-1145-82 5M CAM• OSP

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

SEP 25 1985

I have this day filed Order

REVIEW DENIED

In re: *No.* D003476

JOHN HOLMAN & SONS LTD.

vs.

SUPERIOR COURT, SAN DIEGO

Respectfully,

Clerk

-877 8-82 4M● OSP

(SPACE BELOW FOR FILING STAMP ONLY)

LAW OFFICES OF
MORGAN, WENZEL & MCNICHOLAS
A PROFESSIONAL CORPORATION
1545 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017
(213) 483-1981

Attorneys for Cross-Defendants, JOHN HOLMAN & SONS, LIMITED and HORACE HOLMAN & CO., LIMITED

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

CASE NO. 52 68 28

AFFIDAVIT IN SUPPORT OF CROSS-DEFENDANT'S MOTION TO DISMISS THE CROSS-COMPLAINT OF LAWTON-BRYNE-BRUNER OR IN THE ALTERNATIVE TO REMOVE FOR FORUM NON CONVENIENS

CITY OF LONDON)
) ss:
COUNTRY OF ENGLAND)

PETER DENNIS HORTON being duly sworn, deposes and says:

1. I am the managing director of Horace Holman & Company, Ltd, (hereinafter "Horace Holman") and offer this Affidavit in support of the within Motion to Dismiss the Cross-Complaint of Lawton-Bryne-Bruner.

2. I have personal knowledge of the facts stated below and if called to testify could do so competently.

3. I urge this court to grant this Motion to Dismiss on grounds that there is no basis upon which this court in California can assert jurisdiction over Horace Holman.

4. Horace Holman was incorporated on September 4, 1984, and is a corporate citizen of the United Kingdom.

5. Horace Holman purchased from John Holman & Sons, Ltd. the good will aspect of their Lloyd's of London broking business.

6. With the exception of the purchase of the good will of John Holman & Sons' Lloyd's broking business, Horace Holman has not assumed any assets or liabilities of John Holman & Sons, and therefore Horace Holman is not now nor has it ever been the successor in interest of John Holman & Sons.

7. Horace Holman owns no share of stock in John Holman & Sons.

8. To the best of my knowledge, John Holman & Sons is still in existence.

9. Horace Holman maintains no office or agency for the purpose of carrying on business in the state of California.

10. Horace Holman is not now nor has it ever been licensed to do business in the State of California.

11. Since its inception, Horace Holman has entered into no new contracts or business within California. However, under the said transfer of the Lloyd's broking business, Horace Holman maintains some contact with certain American brokers who had previously placed business through John Holman & Sons into Lloyd's and/or other insurers in the London market, and these brokers themselves may conduct their business in, amongst other places, the State of California.

12. With reference to the alleged insurance policies in question Horace Holman was never involved nor in any way related to any of the alleged activities which led to the filing of this lawsuit. In fact, Horace Holman could not have been involved or related since it has only been in existence since September 4, 1984.

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct.

Executed this _____, 1985, in

_____

By _____

PETER DENNIS HORTON

Subscribed and sworn to
before me this 31st
day of January,
1985.

NOTARY PUBLIC

OFFICIAL SEAL
NATALIE A. MARTIN
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Jan 17, 1986

This Affidavit was telexed to the Offices of Morgan, Wenzel & McNicholas on January 31, 1985. A fully-executed Affidavit in the exact form as this will be filed with this court before the hearing on this motion.

GRETCHEN M. NELSON

(SPACE BELOW FOR FILING STAMP ONLY)

LAW OFFICES OF
MORGAN, WENZEL & McNICHOLAS
A PROFESSIONAL CORPORATION
1948 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017
(213) 483-1961

Attorneys for Cross-Defendants, JOHN HOLMAN & SONS, LIMITED and HORACE HOLMAN & CO., LIMITED

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

CASE NO. 52 68 28

AFFIDAVIT IN SUPPORT OF CROSS-DEFENDANT'S MOTION TO DISMISS THE CROSS-COMPLAINT OF LAWTON-BRYNE-BRUNER OR IN THE ALTERNATIVE TO REMOVE FOR FORUM NON CONVENIENS

CITY OF LONDON)
) ss:
COUNTRY OF ENGLAND)

DAVID McARTHUR HOLMAN being duly sworn, deposes and says:

1. I am the chairman and managing director of John Holman & Sons, Ltd. (hereinafter "John Holman & Sons") and offer this Affidavit in support of the within Motion of Dismiss the Cross-Complaint of Lawton-Bryne-Bruner.

2. John Holman & Sons is a corporate citizen of the United Kingdom with its principal place of business in London, England. It currently is engaged in the business of broking insurance in the London market.

3. I have personal knowledge of the facts stated below and if called to testify could do so competently.

4. I urge this court to grant this Motion to Dismiss on grounds that there is no basis upon which this court in California can assert jurisdiction over John Holman & Sons.

5 By way of background, this cross-complaint arises out of an alleged failure to properly arrange excess protection and indemnity insurance on certain fishing vessels under the ownership and/or management of Ralston Purina, Incorporated. The cross-complaint alleges negligence, fraud, breach of contract and breach of statutory duty in the placement of the said insurance covering the period December 1, 1980 to December 1, 1981.

6. At all material times, John Holman & Sons was an insurance broker licensed to do business in the United Kingdom. As an insurance broker, John Holman & Sons places insurances in the London market for clients. John Holman & Sons was never an insurer.

7. John Holman & Sons has never in the course of its existence maintained an office or agency for the purpose of carrying on business in the State of California. John Holman & Sons has never been licensed to carry on business in California.

8. As regards the insurance that is at issue in this action, John Holman & Sons was engaged by Canadian International Marine Underwriters, Ltd. (hereinafter "CIMU") which is a Canadian corporation with its principal place of business in Toronto, Canada. The relationship which existed between CIMU and John Holman & Sons was that of client/broker, with John Holman & Sons taking instructions from CIMU.

9. John Holman & Sons was engaged by CIMU to place, inter alia, 70 percent of the first layer $200,000 excess of $300,000 protection and indemnity insurance. Accordingly, John Holman & Sons contacted, amongst others, Gerald Herbert, Ltd., a corporation existing under the laws of the United Kingdom which at that time had its principal place of business in London, England, to underwrite the subject policy.

10. As regards the insured, John Holman & Sons was advised by CIMU that the policy was to cover excess protection and indemnity on a fleet of thirty-six marine vessels. The insured was Ralston Purina, Incorporated, known to be a Missouri corporation, with its principal place of business in St. Louis, Missouri.

11. John Holman & Sons had no contact with any California citizen in the placement of the first layer $200,000 excess of $300,000 excess protection and indemnity insurance. At the time of placement, John Holman & Sons had no knowledge that any of its actions would cause an effect in California, nor as regards the marine vessels, were they advised of their navigating waters and home ports. However, on the placement of another layer, $500,000 excess of $500,000, John Holman & Sons did communicate with Reinsurances Limited, a corporate citizen of the Cayman Islands, and their reinsurers who dealt with this matter through their offices in California.

12. John Holman & Sons has, in the course of carrying on their business in the London market, accepted instructions from American brokers to attempt to obtain insurance from Lloyd's and/or other insurers, which brokers may themselves conduct their business in, amongst other places, the State of California.

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct.

Executed on _____, 1985, at _____, England.

By: _____

DAVID McARTHUR HOLMAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

DONALD J. CORREIA and CHERYL MARIE CORREIA,

Plaintiffs,

vs.

CANADIAN INTERNATIONAL MARINE UNDERWRITERS LIMITED, CANADIAN MARINE UNDERWRITERS LIMITED; MARINE OFFICE OF AMERICA CORP.; CONTINENTAL INSURANCE COMPANY; SOCIETA ITALIANO ASSICURAZIONI TRANSPORTI; F.S. JAMES & CO.; AMERICAN CENTENNIAL INSURANCE CO.; JOHN HOLMAN & SONS LTD.; HORACE HOLMAN & CO. LTD.; GERALD HERBERT LTD.; GERALD V. HERBERT; A.R. CRACKNELL; THE BEDFORD INSURANCE CO. LTD., A Hong Kong Company; A.W. KNOTT, BECKER SCOTT; LOWNDES LAMBERT, LLOYD's BROKERS, INSTITUTO DE RESSAGUROS DO BRASIL; REINSURANCES LIMITED; DUNCANSON & HOLT, INC.; AMERICAN ACCIDENT REINSURANCE GROUP; ROBERT MURRAY COLLINS, individually and as nominee of Subscribing Underwriters to Policy 760-5121 A/B; LAWTON - BRYNE-BRUNER INSURANCE AGENCY CO., and DOES 1 through 25, inclusive,

Defendants.

CASE NO: 526828

AFFIDAVIT IN SUPPORT OF JOHN HOLMAN'S RENEWED MOTION TO QUASH THE CROSS-COMPLAINT OF LAWTON-BRYNE-BRUNER AND THE COMPLAINT OF DONALD J. CORREIA AND CHERYL MARIE CORREIA FOR LACK OF JURISDICTION OR IN THE ALTERNATIVE TO DISMISS FOR INCONVENIENT FORUM

LAWTON-BRYNE-BRUNER INSURANCE AGENCY CO., a Missouri corporation,

Cross-Complainant,

vs.

CANADIAN INTERNATIONAL MARINE UNDERWRITERS LIMITED; CANADIAN MARINE UNDERWRITERS LIMITED; MARINE OFFICE OF AMERICA CORPORATION; CONTINENTAL INSURANCE COMPANY; SOCIETA ITALIANO ASSICURAZIONI TRANSPORTI; F.S. JAMES & CO.; AMERICAN CENTENNIAL INSURANCE CO.; JOHN HOLMAN & SONS LIMITED; HORACE, HOLMAN & CO. LIMITED; GERALD HERBERT LIMITED; GERALD V. HERBERT; A.R. CRACKNELL; THE BEDFORD INSURANCE CO. LTD., A Hong Kong Company; A.W. KNOTT, BECKER SCOTT; LOWNDES LAMBERT, LLOYD'S BROKERS; INSTITUTO DE RESSAGUROS DO BRASIL; REINSURANCES LIMITED; DUNCANSON & HOLT, INC.; AMERICAN ACCIDENT REINSURANCE GROUP; ROBERT MURRAY COLLINS, individually and as nominee of Subscribing Underwriters to Policy 760-5121 A/B; and DOES 1 through 100, inclusive,

Cross-Defendants.

City of London)
) ss.
Country of England)

DAVID McARTHUR HOLMAN being duly sworn, deposes and says:

1. I am the Chairman and Managing Director of JOHN HOLMAN & SONS, LTD. (hereinafter referred to as "JOHN HOLMAN") and offer this Affidavit in support of JOHN HOLMAN's Renewed Motion to Quash the Summons and Cross-Complaint and Complaint for Lack of Jurisdiction.

2. I have personal knowledge of the matters stated herein and could testify competently thereto.

3. By way of background, this Renewed Motion to Quash is brought following the apparent denial of this court of JOHN HOLMAN's Motion to Quash the Cross-Complaint of LAWTON-BYRNE-BRUNER and the Complaint of the Plaintiffs, CORREIA. Briefly, this action arises out of an alleged failure to properly arrange excess protection and indemnity insurance on certain fishing vessels under the ownership and/or management of Ralston Purina Incorporated.

4. At all material times, JOHN HOLMAN is and was a corporate citizen of the United Kingdom engaged in the business of placing insurance in the London market. JOHN HOLMAN is not now nor has it even been an insurer. Thus, JOHN HOLMAN is not and never has been a party to any insurance contract that is at issue in these proceedings.

5. As regards the insurance contracts that are at issue in this action, JOHN HOLMAN was engaged by CANADIAN INTERNATIONAL MARINE UNDERWRITERS, LTD. hereinafter referred to as "CIMU". The relationship of JOHN HOLMAN to CIMU was that of broker/client, with JOHN HOLMAN acting upon the instructions received from CIMU.

6. It has been suggested in this court's Decision dated July 10, 1985 that the inclusion of clause entitled "New York Suable Clause" in a particular covernote has some bearing upon the question of jurisdiction with regard to JOHN HOLMAN. For the reasons that are detailed below, such is not the case.

7. Initially, and by way of background, a covernote is a document which sets out the terms of the insurance contract which has been effected by the broker. Normally the covernote will be replaced in due course by a policy; as is the case with the subject covernote. By issuing the covernote, the broker does not incur liability upon the insurance, since he does not purport to be an insurer. The covernote made reference to in L.B.B.'s Motion for Reconsideration operated as a confirmation of the insurance requested by and placed pursuant to the instructions of CIMU, the client of JOHN HOLMAN.

8. The subject covernote is addressed to CIMU and begins

> "In accordance with your instructions we have effected insurance as recorded below. Kindly verify the particulars and if incorrect notify immediately".

There is contained in the paragraph entitled "INFORMATION: (not limit or warranty)" the "New York Suable Clause". The subject insurance contract is an excess protection and indemnity insurance and is, as stated in the paragraph entited "CONDITIONS: subject to the same terms, clauses and conditions as underlying policy or policies". The terms, clauses and conditions of the underlying policy are specified in the said covernote under "INFORMATION". As far as the brokers are concerned, thereby indicating to CIMU that this information has been given to the underwriter at the

time of placing and also gives CIMU the opportunity to revert with any amendments on erroneously placing information. The effect of this clause is simply that the insurer, and not any other party, person or entity may have bound itself to the jurisdiction set forth in that clause for any claims against it arising out the subject insurance policy. If such an agreement exists, it is solely between the insurer and the insured. In fact, as usually the case, the information given to the underwriters at the time of placing and which is set out in the brokers' covernote with regard to the terms, clauses and conditions of the underlying policy, does not appear in the excess protection and indemnity policy which is issued at a later stage.

8. As noted above, JOHN HOLMAN was not, nor has it ever been, an insurer or a party to the subject insurance policy. Thus, the existence or inclusion of the so-called "New York Suable Clause" in the covernote has no bearing whatsoever upon the relationship of JOHN HOLMAN to any party in these proceedings. Although the "New York Suable Clause" may have been a part of a contract between the insurer and the insured, for which the insurer was bound to comply, it most assuredly had no effect upon the position of JOHN HOLMAN herein. In short, JOHN HOLMAN has never been a party to any insurance contract, wherein it agreed to subject itself to the jurisdiction of the State of California or to any other state of the United States of America.

9. Further, and to the extent that this honorable court finds such significant, it should benoted that JOHN HOLMAN has never had any contact whatsoever, business or otherwise, with individuals identified by name as Joseph Magruga, Donald J. Correia, or for that matter any officer and or director of entity entitled "The Conquest Fishing Corporation".

10. Further, it has been suggested that JOHN HOLMAN had "contact" with California with regard to the placement of reinsurance with DUNCANSON & HOLT. In this regard, we ask this court to note that JOHN HOLMAN's placing file on the Ralston Purina account shows that the placement of the layer US $500,000 excess of US $500,000 excess protection and indemnity insurance was placed with REINSURANCES LIMITED in London, England. This excess coverage was discussed and brokered between Mr. Pat Barr (formerly of JOHN HOLMAN) and Mr. David Fenix, then President of REINSURANCES LIMITED, upon the occassion of a visit to London by Mr. Fenix when I was informed that he was, inter alia, promoting business opportunities within the London market.

11. To the best of my knowledge and belief, JOHN HOLMAN had not placed business with REINSURANCES previous to the Ralston Purina account and therefore required a clarification of its security. Mr. David Fenix assured JOHN HOLMAN that REINSURANCES was of good financial standing and was reinsured 99.5% with the American Accident Reinsurance Group, whose managing agents were DUNCANSON & HOLT. We accordingly sought information of this fact from DONCANSON & HOLT. In this regard, we telexed the offices of DUNCANSON & HOLT for said confirmation and received confirmation by telex from the San Francisco of DUNCANSON & HOLT.

12. JOHN HOLMAN had no contact with California with regard to the placement of the layer US $200,000 excess US $300,000 which layer was also placed entirely in London. And, JOHN HOLMAN had no contact with California with regard to the placement of the layer US $500,000 excess of US $1,000,000. This excess coverage

was placed entirely and exclusively in London with various LLOYD'S syndicates and London companies.

13. In short, there has been no contact by JOHN HOLMAN with California with regard to the placement of any portions of the policy of insurance that is at issue. In this regard, we ask this court to reconsider the Decision dated July 10, 1985 and grant JOHN HOLMAN's Motion to Quash Service of both the Complaint and Cross-Complaint in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this _____ day of _____, 1985, at London, England.

BY: _____

DAVID McARTHUR HOLMAN

This Affidavit was telexed to the offices of Morgan, Wenzel & McNicholas. A fully executed Affidavit which sets forth the same facts as this will be filed with this court before the hearing on this Motion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24 day of July, 1985, at Los Angeles, California.

BY: _____

GRETCHEN M. NELSON

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner_____ ☐ a ____ of _____

_____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19 ____, at _____ California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name _____ Signature _____

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT
(other than summons and complaint)

Received copy of document described as _____

on _____ 19____

Type or Print Name _____ Signature _____

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1545 Wilshire Boulevard, Suite 800, Los Angeles, CA 90017

On July 24 1985, I served the foregoing document described as RENEWED MOTION TO SQUASH SERVICE OF THE SUMMONS FOR LACK OF JURISDICTION OR IN THE ALTERNATIVE TO DISMISS FOR INCONVENIENT FORUM

_____ on interested parties

in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

☐ (BY MAIL) I caused such envelope with postage theron fully prepaid to be placed in the United States mail at _____, California.
Executed on _____,
19 ____, at _____,
California.

X (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.
Executed on July 24, 19 85,
at Los Angeles, California.

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

GRETCHEN M. NELSON
Type or Print Name

_____
Signature

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 8, 1985, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Andre E. Jardini, Esq.
Knapp, Peterson & Clarke
70 Universal City Plaza
Suite 400
Universal City, California 91608

James Gorman, Esq.
Ault, Midlam & Deuprey
5030 Camino de la Siesta
Suite 201
San Diego, California 92108

John W. Reed, Esq.
Reed & Reed
7610 Girard Avenue
Suite 200
La Jolla, California 92037

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)